Supreme Court, U.S.
FILED

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No._____

IN THE

SUPREME COURT OF THE UNTIED STATES

OCTOBER TERM, 1998

JAMES JAGGERS

Petioner,

v.

WEST VIRGINIA HUMAN RIGHTS COMMISSION and
RAVENSWOOD ALUMINUM CORPORATION

Respondents.

Petition for Writ of Certiorari to the
West Virginia Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Brent E. Beveridge, Esq.
Beveridge Law Offices
208 1/2 Adams Street
P.O. Box 1469
Fairmont, WV 26555-1469

3988

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied due process of law afforded by the Fourteenth Amendment of the United States Constitution by the West Virginia Human Rights Commission improperly applying the burden of persuasion.

2. Whether the petitioner was denied due process of law afforded by the Fourteenth Amendment of the United States Constitution by the West Virginia Attorney General's office appearing in the proceedings as an advocate and an adversary.

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(304) 363-1907
Attorney for Petitioner

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208 1/2 Adams Street
P.O. Box 1469
Fairmont, WV 26555-1469
(304) 363-1907
Attorney for Petitioner

Petitioner James O. Jaggers prays that a Writ of Certiorari issue the judgment order of the West Virginia Supreme Court of Appeals, entered on September 17, 1998.

OPINION OF THE COURT BELOW

The judgment order of the West Virginia Supreme Court of Appeals is found in Appendix A to this Petition.

JURISDICTIONAL STATEMENT

The September 17, 1998 order of the West Virginia Supreme Court of Appeals (Appendix A) refused a Petition for Appeal of an Order of the Marion County, West Virginia Court (Appendix B) entered on May 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The questions presented in the instant petition are legal in nature. The following statement provides a concise overview of the factual and procedural background upon which the present issues are predicated.

On December 4, 1992, Appellant James O. Jaggers filed an "Employment Complaint Background Information Form" with the West Virginia Human Rights Commission. The complaint

information form completed by Mr. Jaggers in his own handwriting formed the basis for a memorandum of complaint filed by the commission on December 11, 1992.

An amended complaint drafted by Human Rights Commission personnel was filed with the Commission on January 8, 1993, alleging unlawful discrimination arising out of Mr. Jaggers' termination from Ravenswood Aluminum Corporation on June 15, 1992.

The amended complaint was dismissed without prejudice by an order entered on October 25, 1996, pursuant to respondents summary judgment which found as a matter of law that the respondent had terminated all of its hourly employees.

The Commission filed a second amended complaint alleging a discriminatory denial of a promotion. The case proceeded to hearing before the Honorable Mike Kelly, Administrative Law Judge, on December 23, 1996.

Complaint/Petitioner James O. Jaggers was represented by the Attorney General's Civil Rights Division and the Respondent Ravenswood Aluminum Corporation was represented by private counsel.

A Final Decision dated October 30, 1997, was filed by the Administrative Law Judge finding in favor of the respondent, and by an order entered on October 30, 1997, the complaint filed by James O. Jaggers against Ravenswood Aluminum Corporation was dismissed. (Attached as Appendix B)

A timely appeal of the Administrative Law Judge was filed with the West Virginia Human Rights Commission on February 10, 1998.

A final order of the West Virginia Human Rights Commission was entered on May 28, 1998 upholding without modification or amendment the decision of the Administrative Law Judge and thereby dismissing the Petitioner's Complaint. (Attached as Appendix C)

The commission dismissed this action based upon the

following rulings of the Administrative Law Judge:

1. This action is barred by the 180 day limitations period for filing a complaint which was in effect at the time this action was filed on December 11, 1992.

2. The complaint failed to carry his burden of persuasion by a preponderance of the evidence that age was a factor in the respondent's failure to promote the complainant.

A Petition for Appeal was filed on July 14, 1998 with the West Virginia Supreme Court of Appeals. The Supreme Court of Appeals refused the Petition for Appeal by an order entered on September 17, 1998 without an opinion.

The stipulated facts are set forth in the Final Order of the Human Rights Commission attached as Appendix B.

Additionally, the facts establish that James O. Jaggers was a fifty-seven year old male when he filed a Memorandum of Complaint pro se with the Human rights Commission on December 11, 1992. Mr. Jaggers' initial complaint alleged that he was terminated from Ravenswood Aluminum Corp. on June 15, 1992 because of his age in violation of the West Virginia Human Rights Act, West Virginia Code § 5-11-10.

The initial complaint was dismissed on the employer's summary judgment motion by an order entered on October 25, 1996. The basis for the summary judgment motion was that Mr. Jaggers was a replacement worker during a labor dispute and all replacement workers were terminated on June 29, 1992 when the union workers returned. the summary judgment motion was granted without prejudice and a second amended complaint was filed by the Commission alleging that Mr. Jaggers had been denied a promotion prior to his June 29, 1992 termination.

There was a factual dispute on the date that the 180 day limitation period began to run the denial of the promotion. Jaggers contended that he was not notified that another employee, Roger Linkous, was promoted to the foreman's position until mid-June 1992 and that his December 11, 1992 complaint was timely.

Ravenswood contended that the selection of Roger Linkous was announced on May 22, 1992 and hence the December 11, 1992 complaint was some 23 days too late.

The Administrative Law Judge made a legal determination that the 180 day filing limitation in effect at the time of the filing of the complaint on December 11, 1992 applied. A factual determination was made that the time period began to run on May 22, 1992 and ended on November 18, 1992.

The complainant contended and offered credible evidence that he did not receive notice of the denial of the promotion until mid-June 1992. The respondent contended that the complainant was notified that another employee had been selected for the promotion to the position of foreman at a meeting held on May 22, 1992.

The Administrative Law Judge concluded as a matter of law that the complainant was notified of the adverse personnel action on May 22, 1992. this conclusion was reached on a factual issue which the Administrative Law Judge considered a"a very close question".

The Administrative Law Judge considered evidence from both parties concerning the basis for the decision of selecting a 32 year old employee for the position of foreman over the 57 year old complainant.

The evidence can be fairly summarized as showing that Craig Moore, a supervisor in the Green Carbon Department of Ravenswood Aluminum Corporation, selected Roger Linkous, an hourly employee for a foreman's position The only two persons in the department considered for the position were complainant James O. Jaggers, age 57, and Linkous, age 32. Mr. Moore considered Linkous and Jaggers to be the top two employees that he had supervised in the plant.

Mr. Moore had previously selected Mr. Jaggers as an up-grade or fill-in foreman and indicated that the position of up-grade foreman was usually filled by the best available employee. The

evidence further indicated that Jaggers had performed the duties as an upgrade foreman successfully and had gained experience as a foreman prior to Linkous' promotion to the position.

Linkous was selected over Jaggers on the basis of Moore's subjective evaluations of the two employees.

REASON FOR GRANTING THE WRIT

Supreme Court Rule 19 (c) sets forth, as a reason for granting certiorari, that a state court has decided an important federal question in a was that conflicts with applicable decisions of this Court and the Constitution of the United States.

A. BURDEN OF PERSUASION

The process by which the quantity and quality of proof in an employment discrimination case is analyzed has resulted in boundless judicial pronouncements on the burdens of proof and persuasion.

Petitioner has been denied due process of law as secured by Section 1 of the Fourteenth Amendment of the United States Constitution by the Administrative Law Judge's failure to properly analyze and apply the burden of persuasion pursuant to Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67L.Ed.2d 207 (1981)

Initially, Courts must assess whether the employee has established a prima facie case of discriminatory employment action. A prima facie case creates a presumption of discrimination by satisfying the three parts test found in Conaway v. Eastern Associated Coal Company 178 W. Va. 164, 358 S.E.2d 423(1986): "In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code §5-11-1 et seq. (1979), the plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class;

(2) That the employer made an adverse decision concerning the plaintiff;

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway, 358 S.E.2d at 429; see also Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 W. Va. 675, 383 S.E.2d 857,860 (1989)."

Once the prima facie case is established by the employee, the burden of production shifts to the employer to offer a rebuttal to the presumption by producing evidence that the employee was rejected, or someone was preferred for a legitimate nondiscriminatory reason. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). The employer's explanation "must be clearly and reasonably specific", id at 258, and "must be legally sufficient to justify a judgment for the defendant". id at 254.

The Administrative Law Judge's decision does not specify as to where in the burden of proof analysis the complainant's proof failed. It is reasonable to conclude that the complainant made a prima facie case since the adverse decision did not occur by a summary judgment or by a direct verdict. Apparently, the complainant failed to satisfy the ultimate burden of persuasion. The Administrative Law Judge was clearly wrong in reaching this conclusion because the alleged legitimate nondiscriminatory reasons offered by the respondent lacked the clear and reasonably specific explanation as required by Burdine, id at 258.

The Administrative Law Judge's decision extensively considered the employer's subjective opinion of the relative abilities of Mr. Jaggers and Mr. Linkous to serve as foreman. The opinions

were first based upon personnel evaluations. the analysis of the evaluations presented very little distinction between their relative abilities. Ultimately the employer's preference of Mr. Linkous hinged on one supervisor's subjective assessment that Linkous "handled himself better in a pressure situation', and Mr. Jaggers 'was a little bit' insecure in his decision making ability'."

Mr. Moore, the supervisor upon whose testimony the selection of Linkous was justified, alluded to one specific instance where Jaggers "kind of froze". His assessment that Linkous handled himself better in a pressure situation was a general conclusion unsupported by specific events. Mr. Moore's conclusion that Jaggers "kind of froze" was also refuted by comments in his evaluations that Mr. Jaggers wasn't afraid to make decisions.

The distinguishing subjective assessments made by Mr. Moore must be weighed against the objective evidence that Mr. Jaggers had competently served as a fill-in or upgrade foreman if the burden of persuasion s is to be properly analzyed under the "clear and reasonably specific" standard set forth in Burdine, id. A promotion decision based upon an assessment that Linkous "handled himself better" is insufficient according to Nation v. Winn-Dixie Stores, Inc. 570 F.Supp. 1473 (D.C. Ga. 1983); Farber v. Massilon Board of Education, 917 F.2d 1391 (6th Cir. 1990); and Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985).

In Nation the District Court held that an employer 's assessment that the selected employee had a good attitude. took pride in his work, etc. does not meet Burdine's requirement that Defendant articulate a 'clear and reasonably specific' nondiscriminatory reason for its personnel decision. Nation, id at 1475. In Farber, the Sixth Circuit found that an employer's characterization that the promoted employee had a certain "chemistry" for the position failed to satisfy the specific non-discriminatory reason. Farber, id at 1399. Miles involved the type of subjective evaluations used by the respondent in this instance. the evaluations based upon vague non-specific criteria were held to

be insufficient to uphold a claim of legitimate non-discriminatory reason in recalling one employee as opposed to another. Miles id at 871.

When the employer's proffered reasons that Mr. Linkous handled himself better in pressure situations and Mr. Jaggers kind of froze when confronted with a difficult situation are carefully scrutinized, the Administrative Law Judge had no choice but to include that the proffered reasons lacked clarity and specifity. If the employer chooses to base the decision upon subjective criteria, the subjective evidence must by strictly scrutinized to determine whether it is a pretext for discrimination. Love v. Alamance County Board of Education, 757 F.2d 1504, 1507 (4th Cir.1985) Although subjective assessments are to be strictly scrutinized, they may be afforded weight to support a nondiscriminatory reason if they are supported by corroborating objective evidence. Lone, id. In this instance, there is no corroborating objective evidence to support the employer's position. Jaggers and Linkous were hired at the same time. their written personnel evaluations were essentially equal.

One objective factor which clearly preponderates in favor of the complainant is the fact that Jaggers was selected and worked as an upgrade foreman. Logic would dictate that the best available hourly employee was chosen for this position. He remained in the position and the employer offered no evidence to contradict its prior determination that Jaggers was the best employee available for the foreman's position.

B. DENIAL OF DUE PROCESS BY THE ADMINISTRATIVE TRIBUNAL

Petitioner's case was decided by the West Virginia Human Rights Commission. Jaggers was represented before the Human Rights Commission by an Assistant Attorney General of the State of West Virginia.

Pursuant to the statutory scheme of the West Virginia Human Rights Act, West Virginia Code §5-11-1 et seq., the Human Rights Commission must be designated as a respondent in the appeal to the West Virginia Supreme Court of Appeals. the West Virginia Attorney General's office which had represented the Petitioner before the Commission becomes his adversary in the proceeding before the Supreme Court as counsel for the Human Rights Commission.

In this instance, the Attorney General filed a written response in opposition to the petition for an appeal. Fundamental due process is violated by the West Virginia statutory scheme by which a citizen's adversary before the appellate tribunal. Withdraw v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43L.Ed. 712 (19).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,
Brent E. Beveridge, Esq.
208 1/2 Adams Street
Fairmont, WV 26555-1469

Counsel for Petitioner